Filed 2/1/02

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

F. J. VENTURE PARTNERSHIP,

Plaintiff and Respondent,

v.

PAUL M. FILING,

Defendant and Appellant.

F034807

(Super. Ct. No. 208221)

OPINION

APPEAL from a judgment of the Superior Court of Stanislaus County. Roger M. Beauchesne, Judge.

Paul Michael Filing, in pro. per., for Defendant and Appellant.

Damrell, Nelson, Schrimp, Pallios, Pacher & Silva and Matthew O. Pacher for Plaintiff and Respondent.

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Defendant Paul Michael Filing (Filing) appeals from a judgment entered after a three-day court trial in favor of plaintiff F. J. Venture Partnership (Venture), on Venture's complaint for declaratory relief. By its complaint, Venture sought a determination of whether the parties' promissory note, secured by real property, provided for the payment of contingent deferred interest (CDI) upon refinancing.

The trial court found that, under the note, Venture is entitled to CDI in the event of refinancing, or any other event which triggers CDI under the terms of the note. The trial court also ordered that in the event of refinancing, or any other event which triggers CDI under the terms of the note (other than a bona fide sale of the property), the CDI shall be equal to the fair market value of the property (based on a bona fide appraisal of the property) minus the original principal amount of the note, multiplied by 30 percent. The court awarded Venture its attorney fees and costs.

Filing appeals, contending the trial court erred in its interpretation of the note and exceeded its powers in determining that CDI is to be calculated based on the fair market value of the property should a refinancing occur. Filing also claims that the trial court erred in awarding attorney fees to Venture. We affirm the judgment.

FACTS

Filing is a licensed real estate broker, general contractor, and real estate developer, with 30 years of experience. Filing considered himself self-employed in the real estate business at the time he entered into the instant transaction with Venture. Filing's primary endeavor over the prior 10 years involved taking raw land, subdividing and developing it, and then selling the remaining lots, keeping some lots for himself. Filing would then build homes one at a time on the lots he retained.

In December 1996, Filing owned property known as 78275 Monte Sereno Circle, Indian Wells, Riverside County, California (the property); he had acquired title in 1991 or 1992. In 1995, Filing commenced construction of a single-family residence on the property. In late 1996, the property was encumbered by two promissory notes and deeds of trust, which totaled approximately $773,368. One of the promissory notes, with a principal of $723,368, was due on December 5, 1996. The other promissory note, having a principal of $50,000, was due on January 15, 1997.

Near the end of 1996, Filing sought a loan for the primary purpose to pay off the loan that was due on December 5, 1996 (due date later extended by about 6 months). In late 1996, a mutual friend introduced Filing to Fred T. Franzia (Franzia), the chief financial officer of Bronco Wine Company and a partner, along with his cousin, John Franzia, Jr., of Venture.

Venture's principal business is owning vineyard properties and growing grapes to produce wine, although Venture has also made loans, generally to family partnerships or corporations. The mutual friend informed Franzia that Filing was looking for financing for the property. On that same day, Filing gave Franzia a tour of the property. Franzia told Filing that if he were to loan money on the property, he would not be interested in simply providing "bridge financing," but would expect to receive equity in the property if it were sold. Filing told Franzia that properties in the area were selling in excess of $2 million.

Following this meeting, Filing submitted a letter to Franzia, dated December 1, 1996, which contained financial information about the property. In the letter, Filing suggested different alternatives by which a loan transaction could be accomplished to pay off the existing loans on the property and share in the profits. Filing represented to Venture that he intended to sell the property, and he anticipated a sale price of between $1.7 million and $2 million. A December 2, 1996, appraisal, however, valued the property at $1.25 million. Filing never told Franzia about this appraisal; Filing testified at trial, however, that he did not order the appraisal and did not have a copy of it prior to his transaction with Venture. Filing did provide Franzia with an April 1996 appraisal, which valued the property at $1.5 million.

On February 2, 1997, Filing again wrote Franzia, asking him to take another look at the possibility of loaning money on the property to pay off the existing loans, and offering to "arrange a profit sharing position to be received on the sale of the property." In a March 7, 1997, letter to Filing, Venture agreed to loan Filing $800,000 under certain conditions, which included an "equity split." With respect to the equity split, the letter stated: "During 1997, the Net Gross (Selling Price – Loan Payment) will be split 90% Filing, 10% FJ." The letter concluded "If agreeable to you [Filing], please sign and we shall proceed." Filing signed the letter.

Initial drafts of the "Shared Appreciation Note" and "Shared Appreciation Deed of Trust," which F. J. Venture's attorney prepared, were forwarded to Filing on or about May 29, 1997. The draft note provided at paragraph 4 that "[u]pon the sale, conveyance, disposition, transfer or *refinance* of the property," CDI shall be due and payable. (Italics added.) Filing testified he read the draft documents, and that his attorney also received a copy of the documents, which he reviewed for Filing's benefit.

Venture involved its real estate broker, Gerald Marquis, in negotiating the terms of the loan. Marquis met with Filing in April and June 1997. Marquis testified at trial that during the June 1997 meeting, he specifically told Filing "that this loan was going to be based upon 12 percent interest and contingent deferred interest on that loan, and that's the only way it was going to go together, that whether he sold it, optioned it, traded it, refinanced it, whatever it was, Franzia would participate in an equity position." Marquis testified that Filing acknowledged that he understood that to be the terms.

Marquis also testified that he discussed with Filing how CDI would be measured in the event of refinancing:

> "I discussed with [Filing] in detail whether we sold the property, hypothecated it or refinanced it, Mr. Franzia had an equity position. If he sold the property, it would be based upon sales price. If he refinanced, hypothecated, optioned, it would be done on an appraised value."

Marquis testified he never notified Franzia, or anyone at the law firm who prepared the note, that the note did not contain a formula for calculating CDI in the event of a refinance. Marquis did not see a need, however, to change the language in the draft note, since he had previously discussed with Filing that the calculation of CDI on refinancing would be based on an appraisal.

In contrast, Filing testified that he never discussed payment of CDI in the context of refinancing with either Franzia, Marquis, or anyone else prior to executing the note and deed of trust. Filing explained that at that time, his whole emphasis was on selling the property, since he did not think he could ever refinance it. Filing further testified that he was unaware that the word "refinance" was in the note.

On June 2, 1997, Filing forwarded a letter to Marquis, in which he made 21 specific comments to the initial draft, including an increase in the amount to be loaned to $850,000, and proposed changes to paragraph 4, which contained the reference to CDI being due on refinancing. He also sent a letter to Fred Franzia expressing similar concerns about the initial draft of the loan documents. Filing did not question or object to the payment of CDI on refinancing in either of these letters. Filing, in his letters to Marquis and Franzia, did express a concern about an occupancy clause contained in the note and deed of trust, whereby Filing would represent that he did not occupy the property as of the date the documents were executed, and would not occupy the property thereafter.

On or about June 4, 1997, a response to Filing's letters was forwarded to Filing's attorney, Joseph Gibbs. With respect to the occupancy clause, Venture responded that the clause was nonnegotiable, because if Filing occupied the property, the loan would not be a "shared appreciation loan" pursuant to Civil Code section 1917, subdivision (b).[1] At trial, Filing admitted that he occupied the property both before and after the note and deed of trust were finally signed.

On June 24, 1997, a second draft of the note and deed of trust was forwarded to Joseph Gibbs. Filing also received the second draft. This draft still required payment of CDI on refinancing, but incorporated several changes Filing suggested, including increasing the loan amount to $850,000 and allowing Filing to elect to defer payments from the inception of the loan. The second draft of the note and deed of trust also provided that CDI would increase by 10 percent per year in 1998 and 1999, and it removed references to personal property security. Franzia testified at trial that he never asked prior to execution of the note and deed of trust that the CDI calculation be revised to be based on a fair market value or appraised value methodology rather than sales price in case of a refinancing. Franzia testified he understood at the time he executed the note that CDI would be based upon the fair market value of the property because common sense dictated there would be a fair market value whether the property was sold or refinanced.

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[1] Further statutory references are to the Civil Code unless otherwise indicated.

On or about June 28, 1997, Filing specifically approved the revised draft note and deed of trust, and advised that his attorney had also approved the documents, but asked for more money and the ability to defer the payment of quarterly interest-only payments for the life of the loan. He, again, did not object to the provision requiring him to pay CDI on a refinance of the property. Filing signed the loan documents with the understanding that the items listed would be changed to reflect the agreed-upon language. Filing's attorney, Christopher Kiernan, approved the revisions without any objection to the provision requiring payment of CDI on a refinance. On July 8, 1997, another draft was sent to Mr. Kiernan, containing the requested revisions.

Filing and Venture ultimately entered into an agreement, dated June 30, 1997, whereby Venture loaned Filing $860,000, memorialized by a "Shared Appreciation Note" (the note), secured by a "Shared Appreciation Deed of Trust and Assignment of Rents" (the deed of trust) on the property. The note requires Filing to pay F. J. Venture the principal sum of $860,000, together with interest at the rate of 12 percent per annum (ordinary interest). The note calls for quarterly payments of ordinary interest only, and allows Filing to elect to defer those payments for the term of the loan. Filing elected to defer the ordinary interest payments prior to executing the note, allowing appellant to make no interest payments during the term of the note.

The note also requires Filing to pay Venture CDI as follows:

> "Upon the sale, conveyance, disposition, transfer or *refinance* of the property, … in addition to all other amounts and sums due hereunder, the Contingent Deferred Interest, as defined in this Section, shall be due and payable. The Contingent Deferred Interest shall be as follows:
>
> "a. From the date of this Note until December 31, 1997, ten percent (10%) of the Net Gross Amount.
>
> "b. From January 1, 1998, to December 31, 1998, <u>an additional ten percent (10%), for a total of</u> twenty percent (20%) of the Net Gross Amount.
>
> "c. From January 1, 1999, to the Maturity Date, <u>an additional ten percent (10%), for a total of</u> thirty percent (30%) of the Net Gross Amount.

> "The 'Net Gross Amount' shall be equal to the Gross Sales Price of the Property less the original principal amount of this Note of $860,000 (not including any Deferred Payments added to the principal and the Contingent Deferred Interest). 'Gross Sales Price' shall be the gross sales price of the Property without any adjustment for any cost or expense whatsoever." (Italics added.)

The note contains a provision stating that there "are no verbal agreements, understandings or representations related to or concerning this Note, the Deed of Trust, any documents executed by the parties in connection therewith, or the Property." Franzia admitted at trial that he considered the note and deed of trust to be the full and final expression of his agreement with Filing. A further provision of the note states that the note may only be modified in a writing executed by Venture and Filing. Escrow on the property closed in mid-July 1997.

In December 1997, Filing advised Venture, through Marquis, that he had a qualified buyer interested in purchasing the property. In February 1998, Filing advised Marquis that the proposed buyer, Anthony Ciocchetti, was willing to pay $1.4 million, and he requested that Venture waive or greatly reduce the CDI, since Filing found the profit he would make at that sales price—$53,000— "unacceptable." When Marquis asked Filing what he considered a fair profit, Filing responded $200,000, which could be reached by eliminating the CDI. Filing admitted at trial that there was nothing in the note that entitled him to a fair return on the equity in the property, but testified that he intended to reject Ciocchetti's offer if Venture would not agree to waive or reduce the CDI.

On February 11, 1998, Marquis wrote Filing, outlining the amount of ordinary interest and CDI due on the note assuming a close of escrow on February 25, 1998. From this letter, Filing assumed Venture did not want to renegotiate the CDI. Filing then advised Venture that because it was unwilling to lower the amount of CDI due, he rejected the purchase offer.

Because Venture refused to negotiate the CDI, Filing decided to refinance the property. Filing took the position that CDI was not due on a refinance because there was no provision in the note for refinancing. Filing therefore concluded he could refinance the property and then sell it to whomever he wanted, including Ciocchetti, without paying CDI. In March 1998, Filing leased the property to Ciocchetti, giving him an option to purchase the property after Filing refinanced it. Ciocchetti testified Filing told him Filing wanted to refinance the property before he purchased it because that was the only way to get out of the note.

Beginning in spring 1998, Filing sought to refinance the property. Filing did not go forward with the refinancing, however, because the escrow companies received beneficiary demands from Venture and its attorney, which calculated the payoff amount, including the CDI, based on a $1.7 million fair market value of the property provided by Filing. Daniel Leonard, the treasurer of Bronco Wine Company, was in charge of preparing the loan payoff amounts. He testified that he understood from the note that CDI was to be calculated based on the fair market value of the property. Leonard acknowledged that the note refers to sales price, but he believed that merely confirmed the fair market value.

Venture took the position that CDI was due on a refinance, and filed this action on July 6, 1998, for declaratory relief, seeking a judicial declaration of the parties' rights and duties under the note and deed of trust with regard to the CDI. The prayer of the complaint asked for a judicial declaration of the parties' rights and duties in the event of refinancing, reasonable attorney fees, and "such other and further relief as the Court may deem just and proper."

After the lawsuit was filed, Filing sent numerous letters to Ciocchetti outlining various scenarios which would allow Ciocchetti to purchase the property with an escrow reflecting a lower than actual price, thereby minimizing the amount of CDI owed. For example, in a September 16, 1998, letter, Filing set forth two scenarios involving a "sales price" of $1.1 million or, in the alternative, $1.2 million, and the payment by Mr. Ciocchetti of an additional $343,000 to $443,000, for a total cost to Mr. Ciocchetti of $1,543,000. Based on a sales price of $1.1 million or $1.2 million, the CDI due Filing was calculated to be $48,000 or $68,000, respectively. In contrast, based on an actual sales price of

$1,543,000 and applying the formula set forth in the note, the CDI due if the property sold in 1998 would be $136,600.

Filing explained at trial that despite the language in the letters, he was not seriously considering selling the property to Mr. Ciocchetti because he learned around July 1998 that Mr. Ciocchetti was insolvent; instead, the purpose of the letters was to address Mr. Ciocchetti's "ongoing demand to come up with some resolution to purchasing the property" and the letters "were basically concocted to get him to continue to pay his rent." Ciocchetti confirmed at trial that he had filed for personal bankruptcy in the beginning of 1998. Filing further testified at trial that his intent in making these proposals was not to back out of the agreement, but instead to seek an "alternative financial direction" that would protect his investment until he could recover the funds he expended.

Thomas Harmon, a licensed real estate broker, testified as an expert witness at trial. Mr. Harmon expressed his opinion that a fair and reasonable method of calculating CDI on a shared appreciation loan in the event of refinancing would be to use a bona fide, independent appraisal, which would determine the property's fair market value. Mr. Harmon also opined it would be fair and reasonable to use the agreement of the parties on what the fair market value would be.

DISCUSSION

A. Legality of the Note

Filing's first argument on appeal, which he failed to raise below, is that his contract with F. J. Venture is unlawful, and therefore unenforceable. The note which is the subject of this appeal was drafted as a "shared appreciation loan" pursuant to section 1917 et seq. Section 1917 provides:

> "For purposes of this chapter:
>
> "(a) 'Contingent deferred interest' means the sum a borrower is obligated to pay to a lender pursuant to the documentation of a shared appreciation loan as a share of (1) the appreciation in the value of the security property, (2) rents and profits attributable to the subject property, or (3) both.

> "(b) A 'shared appreciation loan' means any loan made upon the security of an interest in real property which additionally obligates the borrower to pay to the lender contingent deferred interest pursuant to the loan documentation. 'Shared appreciation loan' does not include any loan made upon the security of an interest in real property containing one to four residential units at least one of which at the time the loan is made is or is to be occupied by the borrower."

Pursuant to section 1917.005, shared appreciation loan transactions are exempt from usury laws.

Filing reasons that since section 1917, subdivision (b) provides that "shared appreciation loans" do not include loans secured by real property containing one to four residential units when the borrower occupies one of the units, and Venture knew, or should have known, that he was a resident of the property at the time the loan was made, the loan could not be a "shared appreciation loan." Filing concludes that because the note does not qualify as a "shared appreciation loan," the note is illegal and unenforceable.

Venture contends in response that Filing should not be permitted to rely on this entirely new theory on appeal. "It is a firmly entrenched principle of appellate practice that litigants must adhere to the theory on which a case was tried. Stated otherwise, a litigant may not change his or her position on appeal and assert a new theory. To permit this change in strategy would be unfair to the trial court and the opposing litigant." (*Brown v. Boren* (1999) 74 Cal.App.4th 1303, 1316.) We may, however, consider a new theory "when it is purely a matter of applying the law to undisputed facts." (*Ibid*.)

Filing asserts we should consider this new theory because it is a question of law. We disagree. Whatever the merits of this theory, it involves a factual determination of whether Venture knew, or should have known, Filing resided on the property at the time the note was entered into, or that he intended to reside on the property thereafter. While Filing points to his testimony that he was living on the property when he executed the note, and continued to live there thereafter, Filing points to no evidence raised at trial that F. J. Venture knew or should have known that he was living there. Since this new theory involves an issue of fact, and no facts were presented below to support the theory, we find the argument was waived for failure to raise it in the trial court.

B. Interpretation of the Note

Filing contends that the trial court erred in interpreting the note as requiring the payment of CDI in the event of refinancing. Specifically, Filing contends that the inclusion of the word "refinance" in the note was inconsistent with the parties' intent, and therefore should be ignored, and that the trial court erred in admitting extrinsic evidence, including evidence of his conduct after the note was executed. Filing also claims the trial court erred in determining that, in the event of refinancing, CDI is to be calculated by deducting the principal of the note from the property's fair market value. We find no error.

Concerning the standard of our review, Venture asserts that the trial court's decision, being one for declaratory relief, should be reviewed under the abuse of discretion standard. (*Application Group, Inc. v. Hunter Group, Inc.* (1998) 61 Cal.App.4th 881, 892-893; *Auberry Union School District v. Rafferty* (1964) 226 Cal.App.2d 599, 602.) We disagree that the abuse of discretion standard is applicable to every aspect of the trial court's decision.

In this case, the sole issue presented to the trial court for resolution was the proper interpretation of the note. As we will explain, differing standards of review are applicable to contract interpretation, depending on whether an ambiguity exists in the note and whether conflicting extrinsic evidence was properly admitted to assist in interpreting the note. We thus follow contractual interpetation standards in reviewing this matter. (See *Trustors Security Service v. Title Recon Tracking Service* (1996) 49 Cal.App.4th 592, 599 [appropriate standard of review in declaratory relief action, where sole issue presented to trial court was the proper interpretation and application of a statute, was not abuse of discretion, but independent review].)

The goal of contract interpretation is to "give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful." (§ 1636; *Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1264; *Parsons v.*

Bristol Development Co. (1965) 62 Cal.2d 861, 865.) This mutual intention–what the parties meant by the words they used at the time they used them -- "is determined by objective manifestations of the parties' intent, including the words used in the agreement, as well as extrinsic evidence of such objective matters as the surrounding circumstances under which the parties negotiated or entered into the contract; the object, nature and subject matter of the contract; and the subsequent conduct of the parties. [Citations.]" (*Morey v. Vannucci* (1998) 64 Cal.App.4th 904, 912; *Pacific Gas & E. Co. v. G.W. Thomas Drayage etc. Co.* (1968) 69 Cal.2d 33, 38.) The parties' subjective intentions or beliefs are wholly immaterial. (*Estate of Wilson* (1976) 64 Cal.App.3d 786, 802.) Therefore, when a person who can read and understand an instrument signs it, in the absence of fraud or imposition, he or she is bound by the contract's contents and estopped from claiming that its provisions are contrary to his or her intentions or understandings. (*Ibid.*)

Parol evidence is properly admitted to construe a written contract when its language is ambiguous. (*Winet v. Price* (1992) 4 Cal.App.4th 1159, 1165.) When the parties dispute the meaning of the words used in a contract, the court's first step is to determine whether an ambiguity exists. (*Curry v. Moody* (1995) 40 Cal.App.4th 1547, 1552.) However, so critical is the discernment of the parties' true intentions that even where the contract appears plainly unambiguous on its face, "the trial court must provisionally receive any proffered extrinsic evidence which is relevant to show whether the contract is reasonably susceptible of a particular meaning." (*Morey v. Vannucci*, *supra*, 64 Cal.App.4th at p. 912; *Pacific Gas & E. Co. v. G.W. Thomas Drayage etc. Co.*, *supra*, 69 Cal.2d at p. 38.) The evaluation of this extrinsic evidence must always be tethered to the language of the contract itself, because "extrinsic evidence cannot be used to show that when the parties said 'Bunker Hill Monument' they meant 'the Old South Church' or that when they said 'pencils' they really meant 'car batteries.' (*Goode v. Riley* (1891) 153 Mass. 585 ….)" (*Curry v. Moody*, *supra*, 40 Cal.App.4th at p. 1554.)

Accordingly, with both the contract and the provisionally received extrinsic evidence in mind, the court must decide if there is a reasonable possibility the contract language means what either party claims it means. (*Morey v. Vannucci*, *supra*, 64 Cal.App.4th at p. 912.) If the court finds that the contract language is reasonably susceptible to one of the proposed meanings disclosed by the extrinsic evidence, the extrinsic evidence is then admitted to aid in the second step—the determination of what the parties actually intended the contract language to mean. (*Winet v. Price*, *supra*, 4 Cal.App.4th at p. 1165; *Southern California Edison Co. v. Superior Court* (1995) 37 Cal.App.4th 839, 847-848.) Whether or not proffered evidence is relevant to prove a meaning to which the language is reasonably susceptible is a question of law, subject to independent review. (*Winet v. Price*, *supra*, at p. 1165.)

In the second step--the ultimate construction of the ambiguous language--an appellate court is not bound by a trial court's interpretation of a contract where no extrinsic evidence was introduced to explain the contract's meaning; where the extrinsic evidence is incompetent or insubstantial; or where the extrinsic evidence is not in conflict because the parties do not dispute the evidentiary facts themselves but only the inferences to be drawn from those facts. (*Parsons v. Bristol Development Co.*, *supra*, 62 Cal.2d at pp. 865-866; see also *Edmond's of Fresno v. MacDonald Group, Ltd.* (1985) 171 Cal.App.3d 598, 603.) We apply the well known substantial evidence standard only when the trial court's interpretation of the contract turns on the credibility of the extrinsic evidence, a question of fact. (*Winet v. Price*, *supra*, 4 Cal.App.4th at p. 1166; see also *Garcia v. Trust Ins. Exchange* (1984) 36 Cal.3d 426, 439.)

1. "Refinance" as a Term Contained in the Note

Consistent with the foregoing principles, we first independently review whether the language of the promissory note was reasonably susceptible to the meanings urged by Venture or Filing. (See *Curry v. Moody*, *supra*, 40 Cal.App.4th at p. 1552; *Tahoe National*

Bank v. Phillips (1971) 4 Cal.3d 11, 16-17.) The relevant language of the promissory note reads as follows:

> "Upon the … refinance of the property, … the [CDI], as defined in this Section, shall be due and payable. The [CDI] shall be as follows: [¶] a. From the date of this Note until December 31, 1997, ten percent (10%) of the Net Gross Amount. [¶] b. From January 1, 1998, to December 31, 1998, <u>an additional ten percent (10%), for a total of</u> twenty percent (20%) of the Net Gross Amount. [¶] c. From January 1, 1999, to the Maturity Date, <u>an additional ten percent (10%) for a total of</u> thirty percent (30%) of the Net Gross Amount.
>
> "The 'Net Gross Amount' shall be equal to the Gross Sales Price of the Property less the original principal amount of this Note of $860,000 … 'Gross Sales Price' shall be the gross sales price of the Property without any adjustment for any cost or expense whatsoever."

Filing contends that although the note states that CDI is due upon a "refinance" of the property, since the note does not provide a method for calculating CDI in the event of refinancing, and evidence of the parties' negotiations shows that the parties did not contemplate that the note would be refinanced, the word "refinance" should be rejected. We find the note is not reasonably susceptible to an interpretation contrary to its express term of CPI being due upon a "refinance." However, the precise manner of calculating the CPI in the event of refinancing appears ambiguous and subject to interpretation based on extrinsic evidence; this interpretation is discussed separately below. Here, the trial court found, the inclusion of the term "refinance," in and of itself, evidences the fact that the agreement is susceptible to the meaning urged by Venture. The court implicitly found the agreement was also susceptible to Filing's interpretation that would exclude refinancing as triggering CDI, thus admitting extrinisic evidence in deciding the matter. We disagree that there is any ambiguity in the term "refinance" itself as used in the note, but Filing can hardly complain on appeal because he certainly loses his argument when the issue is limited to the four corners of the note. In any event we provide further analysis simply to show that even if ambiguity can be said to exist on the question of whether refinancing triggered CDI, the extrinsic evidence resolves the question in favor of Venture.

The trial court admitted conflicting extrinsic evidence on the parties' intent with respect to the provision for payment of CDI. For example, Marquis testified that he specifically discussed with Filing that CDI would be payable if Filing refinanced the property, and that the amount of CDI payable would be based on the appraised value of the property. Filing, however, testified that he did not have any such conversation with Marquis or anyone else. The trial court's interpretation of the contract, therefore, turned on the credibility of the extrinsic evidence, which is a question of fact for the trier, not for us to weigh on appeal. Accordingly, the trial court's interpretation would need only be supported by substantial evidence.

Here, substantial evidence supported the trial court's interpretation of the note that it provides for payment of CDI upon refinancing. Franzia testified that during his initial discussions with Filing, he made clear that if Venture loaned money to Filing, it was interested in sharing in the equity in the property, not just in providing a "bridge loan" to another financing. Marquis told Filing that CDI would be due regardless of whether the property was sold, refinanced, or otherwise disposed. Filing acknowledged to Marquis that he understood this.

During the parties' negotiations, the language of the three drafts of the note forwarded to Filing always included the term "refinance" in paragraph 4, and the term "refinance" was included in the executed note. In response to the first draft, Filing made 21 specific comments about the note and deed of trust, and, while he asked to modify many of the terms of the note, he did not object to the provision requiring payment of CDI on refinancing. After the second draft of the note was forwarded to Filing, Filing specifically approved the revised note, and advised that his attorney had also approved the note, but did not object to the provision requiring him to pay CDI on a refinance of the property. Another draft was sent to Filing's attorney, Christopher Kiernan, containing the requested revisions, on July 8, 1997. Mr. Kiernan approved those revisions without objection to the provision requiring payment of CDI on a refinance.

This evidence supports the trial court's interpretation of the note as requiring the payment of CDI upon refinancing. The evidence reveals that Franzia clearly told Filing he was only interested in loaning money if Venture could obtain an equity share in the property; all of the draft notes, as well as the executed note, contained the "refinance" language; Filing was made aware of the "refinance" language prior to execution of the note, and Filing never objected to the inclusion of the word "refinance." This evidence supports the trial court's conclusion that the parties intended the CDI provision to apply if the property were refinanced. On this record, we cannot find that the trial erred.[2]

Filing claims the note was, in effect, a contract of adhesion because he had no input into the terms of the note. Contrary to Filing's assertion, the evidence shows that Filing did have input into the terms of the note, as some of Filing's suggested changes were indeed incorporated into the note. Moreover, Filing was experienced and sophisticated in the field of real estate loans and financing. The evidence also shows that Filing's attorney reviewed the note. This is simply not a situation, as Filing attempts to paint it, of an inexperienced person being subjected to a take-it-or-leave-it contract.

Filing also asserts that the trial court erred in failing to construe the ambiguity in the note against Venture on the ground that it drafted the note, employing the canon of construction which calls for construing an ambiguity against the party who caused the uncertainty to exist. (See § 1654.) We reject this suggestion. As explained by the court in *Rainier Credit Company v. Western Alliance Corp.* (1985) 171 Cal.App.3d 255, 263-264:

> "This rule is to be used only when there is no extrinsic evidence available to aid in the interpretation of the contract or where the uncertainty cannot be remedied by other rules of interpretation. [Citations.] The rule does not stand for the proposition that, in every case where one of the parties to a contract

[2]Filing contends for the first time in his reply brief that "the absence of a methodology for the calculation of CDI upon refinancing is not an ambiguity but an omission." Since we have rejected Filing's claim that the note did not provide that CDI would be triggered upon refinancing, this argument would go to the interpretation of how CDI is calculated upon refinancing, which is analyzed below.

> points out a possible ambiguity, the interpretation favored by the nondrafting party will prevail. The rule remains that the trier of fact will consider any available extrinsic evidence to determine what the parties actually intended the words of their contract to mean. [Citation.] Only in those instances where the extrinsic evidence is either lacking or is insufficient to resolve what the parties intended the terms of the contract to mean will the rule that ambiguities are resolved against the drafter of the contract be applied. [Citation.]" (See also *Decter v. Stevenson Properties, Inc.* (1952) 39 Cal.2d 407, 418; *Meyers v. Housing Authority of the County of Stanislaus* (1966) 241 Cal.App.2d 721, 725 [holding § 1654 presumption inapplicable where extrinsic evidence supports trial court's interpretation of a contract].)

Here, extrinsic evidence was available to aid in interpretation of the note. Moreover, as discussed above, this evidence was substantial and supports the trial court's interpretation of the note that it requires the payment of CDI upon refinancing. Therefore, the trial court did not err in failing to construct the agreement against Venture.

Filing's reliance on section 1649 and Code of Civil Procedure section 1864 is misplaced. Section 1649 provides "[i]f the terms of a promise are in any respect ambiguous or uncertain, it must be interpreted in the sense in which the promisor believed, at the time of making it, that the promisee understood it." The evidence on this issue was conflicting, as Marquis testified that he explained to Filing that CDI would be due if the property were refinanced, while Filing testified he was never aware of the term "refinance." Marquis's testimony, which the trial court accepted, supports the conclusion that Filing, as the party promising to pay CDI, understood that Venture believed CDI was due upon refinancing. Since substantial evidence supports the trial court's interpretation, this rule of construction does not help Filing.

Likewise, Code of Civil Procedure section 1864, which provides in pertinent part "when different constructions of a provision are otherwise equally proper, that [sense] is to be taken which is most favorable to the party in whose favor the provision was made," is no help to Filing. The CDI provision was made in favor of Venture, since Venture is the party who will benefit from the payment of CDI. (See *Mitchell v. Exhibition Foods, Inc.* (1986) 184 Cal.App.3d 1033, 1042.) Therefore, the application of Code of Civil Procedure section

1864 actually supports Venture's interpretation of the contract that CDI is due on refinancing.

Filing claims that the trial court erred in admitting evidence of his conduct following the parties' execution of the note. Filing contends this evidence is irrelevant to the issue of contract interpretation because it is inconsistent with the construction of the contract Venture proffered, and did not arise prior to the controversy between the parties over the meaning of the note, citing *Southern California Edison Co. v. Superior Court*, *supra*, 37 Cal.App.4th 839. In *Southern California Edison*, the court discussed the well-settled rule "that in construing the terms of a contract the construction given it by the acts and conduct of the parties with knowledge of its terms, and before any controversy has arisen as to its meaning, is admissible on the issue of the parties' intent." (*Id.* at p. 851.)

As Venture points out, the trial court admitted evidence of Filing's postcontract conduct not only on the ground that it was relevant to the interpretation of the note, but also on the ground that it was relevant to Filing's credibility. Filing does not contend that this ground for admission of the evidence was erroneous.

Moreover, even if it were error to admit the evidence of postcontract conduct, any error was harmless, as the trial court's interpretation of the note was supported by other evidence. (See, e.g., *Inouye v. McCall* (1939) 35 Cal.App.2d 634, 635; 9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 422, pp. 470-471.) As discussed above, the court found that the parties intended that CDI would be payable on a refinancing of the property based on the note's language; Filing's prior experience in real estate loans and financing; Filing's failure to object to the reference to the term "refinance" in the note; and that prior to executing the note, Filing was told, and acknowledged he understood, that CDI would be due regardless of whether the property was sold, refinanced, or disposed of prior to the execution of the note. Since other evidence supports the trial court's interpretation, the claimed error is not prejudicial.

In sum, we conclude that substantial evidence exists to support the trial court's interpretation of the note as providing for the payment of CDI upon refinancing.

2. The Calculation of CDI

The trial court found that in the event of refinancing, or any other event which triggers CDI under the note, other than a bona fide sale of the property, CDI shall be equal to the fair market value of the property, based on a bona fide appraisal of the property, minus the original principal amount of the note, multiplied by 30 percent. Filing claims that the trial court exceeded its powers when it determined this method for calculating CDI upon refinancing, contending that this resulted in a reformation of the note, rather than an interpretation of it.

This declaratory relief action called upon the equitable jurisdiction of the trial court. (*Westerholm v. 20th Century Ins. Co.* (1976) 58 Cal.App.3d 628, 632, fn. 1 [action for declaratory relief is equitable]; *Dills v. Delira Corp.* (1956) 145 Cal.App.2d 124, 129 [same].) As Venture points out, a court in equity deciding a declaratory relief action under Code of Civil Procedure section 1060 has broad powers. The proper function of the court is to make a full and complete declaration, disposing of all the questions of rights involved in the controversy. (*American Enterprises, Inc. v. Van Winkle* (1952) 39 Cal.2d 210, 219.)

The minimal difference between reformation and interpretation is discussed in Witkin, California Procedure:

> "The difference between reformation, which revises the language of a written contract to correct terms placed there by fraud or mistake, and interpretation, which construes the terms but does not revise the language, is thin enough at best. The practical distinction is that, where the grounds for reformation (fraud, mistake, etc.) are present, the action may be brought for the sole purpose of revising the instrument, while interpretation takes place only when an action is brought for some remedy such as damages, specific performance or rescission. But C.C.P. 1060 almost obliterates this distinction, for an action may be brought, without alleging fraud or mistake, solely for the purpose of determining the meaning of the instrument and the rights of the parties under it—in effect, an action for interpretation. And if the declaratory

> judgment gives the written terms a meaning not obvious on their face it is practically the same as a judgment for reformation. (See *Putnam v. Putnam* (1942) 51 Cal.App.2d 696, 698 … [‘if such interpretation took on the nature of a reformation of the contract it was nevertheless within the contemplation of the code section’] ….” (5 Witkin, Cal. Procedure (4th ed. 1997) Pleading, § 811, pp. 266-267.)

In *Putnam*, an ex-husband brought an action for declaratory relief, seeking a declaration of his rights and duties under a separation agreement. The written separation agreement stated that the ex-husband agreed to pay $75 per month for his former wife’s “care, maintenance and support, and the care, maintenance and support of [their] minor child.” (*Putnam v. Putnam* (1942) 51 Cal.App.2d 696, 698.) By the agreement’s express terms, the alimony payments were to be made jointly for the benefit of the wife and the minor son, and when the son reached his majority, all payments for his benefit automatically ceased to be due. (*Id.* at p. 699.) The contract was silent, however, on what portion of the monthly payment was to be paid for the former wife. (*Ibid.*) The trial court granted judgment in favor of both the former wife and the son, denying the former husband any relief. (*Id.* at p. 697.)

The Court of Appeal stated that the case presented a “simple question” whether the code sections providing for declaratory relief “are to be given a reasonable and sensible interpretation to afford the relief which the equities demand or whether they are to be nullified by the strict rules of legal procedure.” (*Putnam v. Putnam*, *supra*, 51 Cal.App.2d at p. 697.) The court concluded:

> “The clear purpose of section 1060 of the Code of Civil Procedure is to permit the court in such proceedings to ‘make a binding declaration of such rights or duties, whether or not further relief is or could be claimed at the time …’ and, under section 1062, these remedies are cumulative ‘and shall not be construed as restricting any remedy, provisional or otherwise.…’ We mention this at the outset because our conclusion from the entire record is that the plaintiff was entitled to an interpretation of the contract determining his rights and duties under it, and that if such interpretation took on the nature of a reformation of the contract it was nevertheless within the contemplation of the Code section.” (*Putnam v. Putnam*, *supra*, 51 Cal.App.2d at pp. 697-698.)

The court further explained that in suing for declaratory relief, the former husband sought an interpretation of the contract, not a modification of it, and that a "declaration of the rights and obligations under a contact which results in a reformation is but a determination of the intention of the parties and of the legal effect of the contract, not a modification of its terms." (*Putnam v. Putnam*, *supra*, 51 Cal.App.2d at p. 699.) The court, noting that the agreement was silent regarding what portion of the monthly payment was to be paid to the wife alone, stated, "We cannot assume that a court of equity is unable to reform the contract to meet these contingencies which the contracting parties overlooked." (*Ibid*.)

The court reversed the trial court's judgment, noting that the trial court did not permit any evidence "to show what proportion of the contract figures was reasonable to be awarded to the wife." (*Putnam v. Putnam*, *supra*, 51 Cal.App.2d at p. 699.) The court then remanded the case to the trial court for retrial, stating that "[t]he only question which the trial court need determine on retrial is what did the parties intend by their contract was a reasonable sum for the husband to pay for the support of the wife after the minor son had reached his majority." (*Ibid*.)

Pursuant to *Putnam*, the trial court in this case had the power, in effect, to reform the contract to meet contingencies which the contracting parties overlooked—namely how CDI should be calculated in the event of refinancing. In making this decision, the trial court was obligated to determine what the parties intended by their contract was a reasonable formula to be used in such a situation.

The trial court found that the parties intended that Venture share in the equity of the property. This finding is supported by the evidence. Franzia told Filing during their first conversation that he was not merely interested in providing "bridge" financing; if he loaned money, he would expect to receive equity in the property if the property were sold. Filing proposed equity sharing after his initial discussion with Franzia. Equity sharing was clearly set forth in the note in the context of a sale, as the note provides that in the event of a sale after January 1, 1999, CDI in the amount of 30 percent of the net gross amount will be due

Venture, and that the net gross amount equals the property's gross sales price less the original principal amount of the note, without adjustments for any costs or expenses.

Furthermore, there is evidence that the parties intended CDI to be calculated based on the fair market value of the property. Mr. Marquis testified that he told Filing that Venture expected CDI if the property were refinanced, which Filing acknowledged. Mr. Marquis also explained to Filing that if he refinanced the property, CDI would be calculated based on appraised value. Franzia testified that he understood at the time he executed the note that CDI would be based upon the fair market value of the property. Venture's expert witness, Mr. Harmon, a loan broker with 25 years experience in private financing secured by real estate, testified that in his opinion a reasonable interpretation of the note is to measure CDI in the event of refinancing based on the property's fair market value, based on a bona fide appraisal.

This evidence amply supports the trial court's conclusion that a reasonable formula for calculating CDI upon refinancing is to use the fair market value of the property in place of the gross sales price, and that this is consistent with the parties' intent. Under the court's equitable powers, the court had the power to determine what the parties intended that formula to be, even though the formula was not included in the note. We find no error in the trial court's determination that the formula should remain the same as the formula specified in the note, with the exception that "Gross Sales Price" should equal the fair market value of the property, based upon a bona fide appraisal, should a refinancing occur.

Filing contends for the first time in his reply brief that section 1917 "mandates" annual independent appraisals in order to determine the value upon which CDI may be calculated. Filing concludes that because Venture did not obtain these appraisals, Venture could not rely on his opinion regarding the fair market value of the property to determine the amount of CDI owed. This argument fails for several reasons.

First, this argument was not raised below and is being raised for the first time in the reply brief. On both of these grounds, we need not address Filing's argument. (See *Brown v.*

Boren, *supra*, 74 Cal.App.4th at p. 1316; *Campos v. Anderson* (1997) 57 Cal.App.4th 784, 794, fn. 3.)

Second, as Venture points out, there is no requirement under section 1917, or any other provision of chapter 3.5 of the Civil Code, which governs shared appreciation loans, to obtain an independent appraisal. While section 1917.040 required independent appraisals, this section applied to shared appreciation loans involving pension fund lenders and became inoperative on January 1, 1990. (See Stats. 1982, ch. 466, § 11.5, p. 1989.) Section 1917.142 describes the required process for obtaining appraisals to determine the fair market value of property subject to a shared appreciation loan, but this provision became inoperative on January 1, 1987. (Stats. 1982, ch. 466, § 12.5, p. 2006.) Sections 1917.410 through 1917.412 apply to shared appreciation loans for seniors. Section 1917.412 describes the required process for obtaining appraisals to determine the fair market value of property subject to a shared appreciation loan for seniors. There is no evidence, however, that this case involves a shared appreciation loans for seniors, persons who are at least 65 years old. (§ 1917.320, subd. (d).)

Finally, whether Venture used Filing's opinion regarding the fair market value of the property in the past is irrelevant to the trial court's determination, as the trial court specifically determined that in the event of refinancing, CDI would be determined by using the fair market value of the property, based on a bona fide appraisal.

C. Attorney Fees

The trial court awarded Venture its attorney fees and costs pursuant to section 1717. The trial court found Venture was entitled to attorney fees because the note contained an attorney fees provision, the declaratory relief action was an action "on a contract" as required under section 1717, and Venture was the prevailing party in the action. Filing contends that the trial court erred in awarding attorney fees in favor of Venture. Specifically, Filing contends that because this was an action for declaratory relief, not breach of contract, the note's attorney fees provision does not apply.

Filing cites no legal authority to show that the trial court erred in awarding attorney fees. When a brief does not contain a legal argument with citation to authority, this court may treat an issue as waived and pass it without consideration. (*People v. Stanley* (1995) 10 Cal.4th 764, 793; *Amato v. Mercury Casualty Co.* (1993) 18 Cal.App.4th 1784, 1794.)

Even if not waived, Filing's argument fails. Section 1717, subdivision (a) provides in pertinent part:

> "In any action on a contract, where the contract specifically provides that attorney's fees and costs, which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing party, then the party who is determined to be the party prevailing on the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney's fees in addition to other costs."

Paragraph 12 of the note provides "that if any legal action is necessary to enforce or collect this Note, the prevailing party shall be entitled to reasonable attorneys' fees, in addition to any other relief which that party may be entitled." Filing contends that the attorney fees provision is inapplicable because a declaratory relief action is not a legal action "to enforce" the note. Other courts have rejected this argument.

In *Harbour Landing-Dolfann, Ltd. v. Anderson* (1996) 48 Cal.App.4th 260, 263, the court addressed the same argument in the context of a declaratory relief action Harbour Landing brought against the Andersons regarding the parties' rights under a lease with respect to a rent adjustment. Harbour Landing contended that a declaratory relief action is not brought "to enforce" a lease, but instead to interpret the lease, and therefore the lease's attorney fees provision that provided for attorney fees incurred "to enforce any provisions" of the lease did not apply.

In rejecting this argument, the court stated: "Despite its declaratory relief nature, this action was clearly one to enforce the parties' rights under the lease. Had Harbour Landing refused to pay the amount of rent the Andersons demanded, and the Andersons filed an action for breach of the lease, the provision would surely apply." (*Harbour Landing-Dolfann, Ltd. v. Anderson, supra*, 48 Cal.App.4th at p. 263; see also *Milman v. Shukhat* (1994) 22

Cal.App.4th 538 [rejecting argument that attorney fees improperly awarded because declaratory relief action was not action "to enforce that contract"].)

Similarly here, the declaratory relief action Venture brought was clearly one to enforce the parties' rights under the note. Had Filing refinanced the property and refused to pay CDI, and Venture filed an action for breach of the note, the attorney fees provision would surely apply. We find no merit in Filing's argument.

Venture asks this court to separately award attorney fees and costs incurred during this appeal. Venture is allowed to make a motion in the trial court for attorney fees on appeal. (See *Christensen v. Dewor Developments* (1983) 33 Cal.3d 778, 786-787; *Milman v. Shukhat*, *supra*, 22 Cal.App.4th at p. 546.)

DISPOSITION

The judgment is affirmed. The trial court is directed to hear, after the remittitur is filed, any application for attorney fees for services rendered to Venture on appeal, and fix the reasonable amount thereof. Venture is awarded its costs on appeal.

VARTABEDIAN, Acting P. J.

WE CONCUR:

WISEMAN, J.

LEVY, J.